

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

1 DENNIS ALLEN, MARY JANE ) Case No: C-1-01-159  
2 CRACRAFT, LELAN LITRELL and )  
3 GLASS, MOLDERS, POTTERY, PLASTIC ) Judge Herman J. Weber  
4 AND ALLIED INDUSTRIAL WORKERS, ) Magistrate Judge Timothy S. Hogan  
5 LOCAL NO. 41, AFL-CIO, )  
6 Plaintiffs, )  
7 vs. )  
8 LEONARD D. KRISTAL, and JOHN L. )  
9 CRARY, )  
10 Defendants. )  
11 \_\_\_\_\_ )  
12 JOHN L. CRARY, )  
13 Cross-Claimant, )  
14 vs. )  
15 LEONARD D. KRISTAL, )  
16 Cross-Defendant. )  
17 \_\_\_\_\_ )  
18 JOHN L. CRARY, )  
19 Third-Party Plaintiff, )  
20 vs. )  
21 POLLY JONES, SHIRLEY MONROE, )  
22 JAMES THELAN, )  
23 Third-Party Defendants )  
24 \_\_\_\_\_ )

25 Defendant John Crary and respectfully submits his Memorandum in opposition to  
26 Plaintiffs' Motion for Summary Judgment.  
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1                   **I.**2                   **SPECIAL INTRODUCTION**

3                   Crary's counsel learned only on December 9, 2003 that this Memorandum of Points and  
4                   Authorities in Opposition to plaintiffs' motion for summary judgment had mistakenly not been  
5                   filed along with the other eleven documents filed by Crary the day before Thanksgiving.

6                   Plaintiffs and both Third-Party Defendants had filed motions for summary judgment on  
7                   November 10, 2003, 26 days after the Court's October 15, 2003 scheduling order deadline. Crary  
8                   (in an abundance of caution) had calculated that his twenty-day time period (per the same  
9                   scheduling order) to oppose these three motions for summary judgment ran November 30, 2003.  
10                  Because November 30, 2003 was the Sunday following the Thursday Thanksgiving holiday, Crary  
11                  had filed his oppositions to all three of these motions the day before Thanksgiving. In the other  
12                  eleven documents filed that day, Crary highlighted the fact that all of Plaintiffs' and Third-Party  
13                  Defendants' documents were untimely filed. Nothing about the tardiness of this documents makes  
14                  any of Plaintiffs' and Third-Party Defendants' 26-day-late motions any more timely or lessens  
15                  Crary's assertion that they were late when filed.

16                  Unfortunately, because Crary was trying to file twelve documents the day before  
17                  Thanksgiving, one of them (this one) somehow slipped through the cracks. The memorandum was  
18                  completed and ready for filing on November 26, 2003, but was missed by local counsel. Crary is  
19                  now in the unenviable position of being the pot calling the kettle black. Nonetheless, he still  
20                  argues that all of Plaintiffs' and Third-Party Defendants' summary judgment motions are untimely,  
21                  even while admitting that this memorandum of points and authorities can also be found untimely.  
22                  Even though Crary doesn't argue that this late filing is somehow Plaintiffs' fault, he cannot help  
23                  but wonder whether; had Plaintiffs and Third-Party Defendants complied with this Court's  
24                  scheduling order, he would not have been trying to file twelve documents the day before  
25                  Thanksgiving.

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II.2  
**INTRODUCTION**

3 Looking through Plaintiffs' documents in support of their motion for summary judgment it  
 4 is clear that they amended their complaint to bring John L. Crary ("Crary") into this lawsuit not  
 5 because of any liability he might have to Plaintiffs, but because they believe he is a deep pocket  
 6 who can pay their alleged damages.

7 Plaintiffs recently filed a host of confusing pleadings, including their 34-page "cross-brief"  
 8 which purported to oppose Crary's motion for summary judgment and support their motion for  
 9 summary judgment. However, their motion for summary documents 1) was filed almost a full  
 10 month after the deadline imposed by this Court's scheduling order, 2) exceeded the number of  
 11 pages allowed for by the local rules, 3) purportedly combined with an opposition to Crary's motion  
 12 for summary judgment (which is also untimely) and 4) contained reference to hearsay, innuendo,  
 13 unsupported argument and other faulty evidence, all in a desperate attempt to find Crary liable for  
 14 fiduciary duties he did not have.

15 What Plaintiffs did not do was 1) attempt to identify actual, admissible, factual support for  
 16 any of their conclusory arguments and statements, 2) file their motion timely, or 3) proffer any  
 17 admissible factual support to any of their statements of fact.

18 **A. PLAINTIFFS ARE A MONTH LATE.**

19 October 15, 2003 was the last day to file dispositive motions in this matter in accordance  
 20 with this Court's amended scheduling order. Plaintiffs and Third-Party Defendants filed a raft of  
 21 pleadings on November 10, 2003, all untimely under this Court's amended scheduling order.<sup>1</sup>

22 Plaintiffs' intentional or ignorant refusal to file pleadings in accordance with this Court's  
 23 amended scheduling order has also placed the timing of Crary's opposition in question, particularly  
 24 with the advent of the Thanksgiving Holiday. Crary completed and tried to file his opposition to

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 26 <sup>1</sup> Unbelievably, Crary's counsel received electronic notice from the Court that Plaintiffs were attempting to file  
 27 additional documents, including supplemental memoranda in connection with the summary judgment motions, as late  
 28 as November 18, 2003 and November 20, 2003. Crary assumes that the amended brief filed on November 20, 2003 in  
 support of Plaintiffs' refilled cross-motion for summary judgment contains no substantive changes from the brief filed  
 on November 10, 2003.

1 Plaintiffs' motion for summary judgment on November 26, 2003, within 20 days following  
2 Plaintiffs' tardy filings, in an attempt to stay within the scheduling this Court ordered.  
3 Unfortunately, as explained above, one of an even dozen documents (this one) was mistakenly not  
4 filed on that date.

5 **B. PLAINTIFFS ARE MORE THAN A DOLLAR SHORT.**

6 Plaintiffs have the gall to state in their cross-brief that Judge Hogan's Report and  
7 Recommendation on Crary's previous motion to dismiss, which outlines Plaintiffs' burden, was  
8 wrongly decided because Judge Hogan "misread or misapplied" the law. Plaintiffs then pontificate  
9 about their interpretation of the appropriate legal standard (of course stating conclusively that they  
10 met the standard they created). Plaintiffs then go on to refer to inapplicable case law as the alleged  
11 standard for this case, but which this Court never adopted.

12 This last point is critical. For what is obvious from Plaintiffs' cross-brief, even before  
13 getting to Crary's purported breach of fiduciary duty, is that their theory of liability for Crary is  
14 fundamentally flawed. Either Plaintiffs or their counsel do not understand basic corporate law, or  
15 they choose to ignore it. As mentioned throughout their cross-brief, Plaintiffs state that the "crux"  
16 of their case against Crary is that he became a fiduciary under ERISA by virtue of his "power" to  
17 appoint and remove Leonard Kristal ("Kristal"). This "power" is never defined or described by  
18 Plaintiffs, despite repeatedly being alluded to. The Plaintiffs do not bother taking the Court or  
19 Crary through the method by which this power might have been wielded by Crary; nor do they  
20 identify 1) whether this power, by necessity, included assistance by any third parties not present  
21 before this court, or 2) exactly where in Delaware corporate law this "power" was given to Crary.

22 However, as made abundantly clear by the evidence Crary painstakingly presented, Crary  
23 was only one of three directors of Lassen during the relevant time period. He could never  
24 unilaterally appoint or remove Kristal as the CEO of Lassen. Only the Board could do that.  
25 Hence, Crary individually lacks the requisite ability to act and is not a fiduciary under ERISA.  
26 Plaintiffs' case fails for this reason alone.

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1 And even assuming that Plaintiffs can get past this initial hurdle on their summary  
2 judgment (they cannot), there is no evidence that Crary breached any purported fiduciary duty  
3 under ERISA, or violated any other section of ERISA. Accordingly, Plaintiffs' motion for  
4 summary judgment should be denied.

II.

## **ARGUMENT**

**A. PLAINTIFFS' BRIEF WAS FILED LATE AND SHOULD BE DISREGARDED BY THE COURT.**

The Court entered the Amending Scheduling Order for this matter on May 29, 2003. The Order states at paragraph 3 that all dispositive pretrial motions are to be filed by October 15, 2003.

Plaintiffs had until such time to file their motion for summary judgment. However, Plaintiffs filed their motion on November 10, 2003 – 26 days past the deadline. Their cross-brief exceeds the page limit per local rule and contains an opposition by Plaintiffs to Crary’s motion for summary judgment filed 6 days after the deadline for such opposition.

15 Crary dislikes making procedural arguments of this sort, but he has actually been  
16 disadvantaged by Plaintiffs' careless attitude. Among other things, Crary has had to decide to  
17 which of Plaintiffs' filings he would reply to now; Plaintiffs got an additional 26 days to prepare  
18 their summary judgment motion; and Crary has had to guess when his opposition would be due  
19 since Plaintiffs' filings bore no resemblance to the amended scheduling order.

20 In short, Plaintiffs' motion is tardy all to Crary's great prejudice. Plaintiffs should not be  
21 allowed to ignore, with impunity, the orders of this Court. Accordingly, Crary requests that this  
22 Court disregard Plaintiffs' untimely motion.

**B. THE COURT SHOULD DENY PLAINTIFFS' SUMMARY JUDGMENT BECAUSE PLAINTIFFS CANNOT ESTABLISH THAT CRARY WAS A FIDUCIARY.**

Despite their protestations otherwise, Plaintiffs attempt to attach an ERISA fiduciary label to Crary solely because he was one of the three directors and held the title of Chairman of the Board of Lassen. Plaintiffs admit that the “crux” of their case against Crary is that the ERISA fiduciary label attaches to Crary because he alone allegedly had the “power” to appoint, retain and

1 remove Kristal as the plan fiduciary. (Plaintiffs' Memo. at 13). Hence, the first step in their case  
 2 is to establish that Crary is a fiduciary before looking to any alleged breach of that duty. As a  
 3 matter of law, Plaintiffs cannot do so.

4 Plaintiffs take the inconsistent position of noting that Crary was one of three directors, and  
 5 then assert that he could have somehow unilaterally taken some action to appoint or remove Kristal  
 6 as CEO or plan fiduciary. Of course they never actually point to any law that would allow this, nor  
 7 do they illustrate how this alchemy could actually occur. The following short discussion of  
 8 Delaware corporation law illustrates that this hurdle is insurmountable for Plaintiffs.

9 Lassen is a Delaware corporation. Delaware Corporation Code §141(a) provides that, "The  
 10 business and affairs of every corporation organized under this chapter shall be managed by or  
 11 under the direction of a Board of directors." There is no provision in Delaware corporate law for  
 12 any director to take any action unilaterally. The Board's powers and authority may be exercised  
 13 only collectively. Subsection (b) provides that, "a majority of the total number of directors shall  
 14 constitute a quorum for the transaction of business," and that, "the vote of the majority of the  
 15 directors present at a meeting at which a quorum is present shall be the act of the Board of  
 16 directors." Delaware Corporations Code §141(b). Thus, unlike officers, an individual director has  
 17 no authority to take action on behalf of a corporation.<sup>2</sup>

18 Further, there are no special powers or rights held by a "Chairman of the Board." Nowhere  
 19 in Delaware corporate law is there any provision for a "super" vote by the Chairman, the ability of  
 20 the Chairman to make special decisions or dictate to the Board as a whole or any other conceivable  
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22 <sup>2</sup> For that matter, once a person is a director it is quite hard, if not completely impossible, to remove that person from  
 23 office without a shareholder vote. For example, *Dillon v. Berg*, 326 F.Supp. 1214 (D.Del.), aff'd, 453 F.2d 876 (3<sup>d</sup>  
 24 Cir. 1971) stated in unequivocal terms that a by-law provision permitting directors to remove a fellow director without  
 25 a clear showing of cause violates public policy. In *Dillon*, the court followed the Delaware Court of Chancery in  
*Bruch v. National Guarantee Credit Corp.*, 116 A. 738 (1922), in which the Court appeared to reject the existence of  
 26 the power to remove a fellow director even for cause based upon the same policy. That power is vested only in the  
 27 shareholders, and here a shareholders voting agreement made such removal impossible. The record is clear that  
 Kristal carefully protected himself in connection with his formation of Lassen. It is undisputed that Kristal required a  
 voting agreement protecting his Board seat and that he had a very high severance provision if he was ever fired by the  
 Board as CEO. Kristal did his due diligence and set up his company, Lassen, to protect himself from interference,  
 even by the entire Board of directors, let alone attempted unilateral action by the Chairman of the Board.

1 “extra power. The Chairman is simply a director who may preside over meetings, but does not  
 2 even have the power to cut short discussion or invoke *Robert’s Rules of Order* in an attempt to  
 3 limit discussion or steer that discussion in any particular direction.

4       The underlying and overriding policy of Delaware law with respect to exercising the  
 5 functions of the Board of directors is collegiality. *Delaware Corporation Law and Practice*,  
 6 § 13.01[6], page 13-8 (Matthew Bender (2003), Drexler, Black, Sparks, editors). To be valid,  
 7 actions of a Board must be taken at a meeting where all members are afforded the opportunity to  
 8 be present. *Liberis v. Europa Cruises Corporation*, 1996 WL 73567 (Del. Ch. 1996).

9       The employment agreement referenced by Plaintiffs on page 19 of their memorandum is  
 10 *unsigned*. However, it does say at paragraph 2, and Plaintiffs admit on page 19 of their cross-  
 11 memorandum, that Kristal had a duty to report to and take directions from the Company’s (e.g.,  
 12 Lassen’s) Board of Directors. There is absolutely no allegation here, nor is there any evidentiary  
 13 support for the proposition, that Kristal had any duty, obligation or requirement whatsoever to take  
 14 any direction from Crary alone.

15       The following is undisputed. Kristal was appointed CEO of Lassen by the Lassen Board.  
 16 He was to report to and take direction from the Board. Only the Board could remove him as CEO  
 17 of Lassen. Crary could not unilaterally appoint or remove Kristal as CEO of Lassen. Crary could  
 18 not (and did not) unilaterally appoint or remove Kristal as the plan fiduciary. It must follow then  
 19 that Crary had no obligation to monitor and oversee Kristal. Even if Crary actually knew of  
 20 Kristal’s malfeasance (which he did not), he did not have the power to take unilateral action.

21       Plaintiffs want to focus on some purported authority of Crary as Chairman of the Board.  
 22 Yet, pursuant to Article IV, Section 6 of the bylaws, Crary’s only authority as Chairman of the  
 23 Board is to preside at Board meetings at which he is present. Neither the Board, nor the bylaws,  
 24 nor Delaware law assigned any other powers or duties to him. There is no evidence supporting  
 25 Plaintiffs’ assertion that Crary held the authority or power either to remove Kristal as a director, to  
 26 remove him as CEO, to remove the responsibility for the benefits plans from him, or unilaterally to  
 27 cause the Board to do so. On the contrary, the first section on page 7 of the Shareholders  
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1 Agreement, and Section 2 of Kristal's Employment Agreement specifically restrict Crary's ability  
2 to do so. Pursuant to Kristal's Employment Agreement, Kristal would report to and take directions  
3 from the Board, not Crary. Pursuant to the Shareholders Agreement, Kristal would be one of the  
4 three Board members and could not be removed so long he was a shareholder of the company.

5 In addition to being flat out wrong on Crary's unilateral ability to do anything to Kristal,  
6 Plaintiffs do not even try to honestly present admissible evidence supporting their assertions. For  
7 example on page 18 of their cross-brief Plaintiffs assert that "Crary . . . gave Kristal complete  
8 authority over all of Lassen's employees benefit plans." Plaintiffs baldly cite to Crary's deposition  
9 at page 81, without the benefit of having prepared a counter-statement of undisputed facts. The  
10 best interpretation of this is that it misconstrues Crary's testimony; the worst that it is intentionally  
11 misleading. What Crary said was as CEO, "He [Kristal] would be in charge of the operations of  
12 the company."

13 The simple conclusion here is that Crary has no liability as an ERISA fiduciary as a matter  
14 of law because he did not have either the unilateral power or authority to appoint or remove Kristal  
15 as a director, CEO or a plan fiduciary.

16 **C. CRARY HAD NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF KRISTAL'S  
17 BREACH OF FIDUCIARY DUTY.**

18 Judge Hogan outlined in his Report and Recommendation precisely what Plaintiffs need to  
19 prove to establish liability against Crary in this lawsuit.

20 "*Plaintiffs must demonstrate what [Crary] knew and when he knew it and apply  
21 either the actual or constructive knowledge of Mr. Crary to each transaction  
22 engaged in by the Plan Administrator.*" [Judge Hogan's Report and  
23 Recommendation, at 5].

24 Plaintiffs cannot establish co-fiduciary liability against Crary. Plaintiffs have failed to  
25 establish that Crary had any actual or constructive knowledge of Kristal's breach of fiduciary  
26 duties. Plaintiffs' evidence is irrelevant, completely deficient or inadmissible as hearsay, or worse.

1       1) The little evidence proffered by Plaintiffs is irrelevant, deficient or inadmissible.

2           Plaintiffs cite Randy Pickering's deposition for the proposition that Pickering informed  
3 Crary, in the last of three purported telephone calls, that Kristal was committing fraud with the  
4 health insurance. However, Pickering's telephone records specifically contradict any testimony  
5 that he ever called Crary in the time period stated. While it is not the job of this Court in this  
6 proceeding to weigh evidence, all it needs to deny Plaintiffs' motion for summary judgment is a  
7 dispute concerning a material fact. The telephone records produced from Pickering do not support  
8 his story that he called Crary at any of Crary's numbers in the year 2000. Nowhere in Pickering's  
9 telephone records is there any record of any call to any number of John Crary. While Plaintiffs  
10 have marked as false Crary's undisputed fact number 54, they have produced absolutely no  
11 evidence that such a call was ever made. If the fact is untrue, identify the call to Crary. They do  
12 not because they cannot. Pickering never called Crary on any phone, nor is there any phone record  
13 showing that Pickering ever called Crary at any of Crary's numbers other than the three calls to his  
14 office in 1999. This fact is completely undisputed and goes in Crary's favor, not Plaintiffs'.

15           Plaintiffs then disdainfully attempt to use Crary's wife's horrific automobile accident in  
16 their favor with respect to Crary's knowledge of health premiums not being paid. Again, Randy  
17 Pickering and Polly Jones' general deposition testimony does not reflect what Plaintiffs allege in  
18 their cross-brief. Pickering testified that Crary called to see if there was coverage after the accident  
19 and that the only problem that arose was a subrogation issue between the accident victims'  
20 insurance carriers. Jones, the health plan administrator, further testified that the accident happened  
21 in 1999 before there were any problems with the health insurance. Therefore, there was nothing to  
22 report to Crary.

23           Plaintiffs quote at length the deposition testimony of Michael Lindemuth on pages 24 and  
24 25 of their memorandum. However, as is obvious from the deposition testimony on which  
25 Plaintiffs rely, Mr. Lindemuth has no first-hand knowledge whatsoever of what Crary knew or did  
26 not know. He "believes" that Crary, in "his opinion," was aware there was a problem with the  
27 health insurance because of Crary's wife's car accident. Lindemuth is clearly speculating and this  
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1 testimony would be inadmissible as hearsay and as speculation lacking any foundation whatsoever  
2 at any trial on this matter. At the top of page 25 of Plaintiffs' cross-brief it says that "Lindemuth  
3 verified that in June 1999 Bob Bernet, Jr. contacted John Crary regarding Lenn Kristal's handling  
4 of the finances," but this entire statement is inadmissible hearsay. Crary objects to all of this  
5 supposed evidence on these bases.

6 Moreover, the testimony of Lindeman at page 24 does not convey that Crary was the top  
7 decision maker for Lassen, but, rather, that Kristal (the CEO) was the top decision maker. The  
8 same is true with respect to Crary's involvement with the Union negotiations. Lindemuth never  
9 states at pages 45 and 46 that Crary directly and personally handled the negotiations. Quite the  
10 opposite in fact. Lindemuth testifies that Crary merely sat in the meetings but that Kristal did  
11 most of the talking and that Crary did not speak much but "basically observed and listened."

12 Lloyd Nolan's deposition adds nothing to Plaintiffs' case. Other than testifying that Crary  
13 was present at two meetings dealing with the Union and Wright-Bernet, Nolan remembers little if  
14 anything about the meetings or Crary's involvement or lack thereof. His other testimony is  
15 relating what others may have told him and is hearsay. (Nolan transcript at pages 25, 29-30). As  
16 such, Plaintiffs cannot support their proposed finding of fact Nos. 27 or 32.

17 Similarly, testimony proffered relating to the general financial problems of Lassen is  
18 irrelevant and cannot be bootstrapped to show that Crary had knowledge of specific conduct of  
19 Kristal relating to the health or 401k plans. If knowledge that things are not great with a company  
20 financially is sufficient to impose ERISA liability on all senior management, then thousands of  
21 directors and officers face massive liability in this long-lasting economic slump. Plaintiffs'  
22 references to a child support payment issue and general financial problems of Lassen on pages 11  
23 and 25 of their memorandum are totally irrelevant to this proceeding. This kind of "back door"  
24 evidence shows no specific knowledge by Crary about health insurance premium deductions.  
25 Crary submits that Plaintiffs present such evidentiary hyperbole in a vain hope that this Court will  
26 not look too closely at exactly what evidence they have accumulated, or, more accurately, failed to  
27 accumulate.

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1       No one from Lassen ever reported to Crary about non-payment of employees' contributions  
2 to the health benefit plan or 401(k) plan. Neither Polly Jones nor Shirley Monroe informed Crary  
3 about the problems with the plans, even when both of them were on the front line in managing the  
4 plans. Plaintiffs mark as false Crary's undisputed fact number 32, that Polly Jones did not inform  
5 Crary that Kristal had failed to pay health insurance premiums, yet Plaintiffs offer no evidence as  
6 to why this fact is false, and the fact is supported by Jones' own deposition testimony. Plaintiffs  
7 offer no evidence whatsoever, let alone credible evidence, that Jones so informed Crary.

8           Bob Bernet's testimony is taken out of context and contains hearsay as well. He testifies at  
9 pages 20-22 that he mentioned to Crary in 1999 that Wright-Bernet was having some financial  
10 tribulations and customers were complaining about Kristal. He does not mention the health plan  
11 specifically because there were no troubles with the plan in 1999. He is simply discussing general  
12 financial issues that cannot be equated with constructive knowledge to Crary about the plans. His  
13 testimony on pages 21-22, 30, and 60 is irrelevant to any issue in this lawsuit, speculative opinion  
14 in many instances, and contains hearsay. When asked if the chain of command for Lassen on paper  
15 was "John, Len, Bob," Bernet specifically stated that he never saw anything official to that effect  
16 on paper. (*Id.* at 26, 27). This makes any evidence Bernet has to offer on this subject speculative  
17 and inadmissible; it was certainly not a subject on which he could competently testify. More  
18 examples of hearsay are contained at pages 33 and 34 where Burnet explains that his understanding  
19 of Kristal leaving Lassen was based on a "conversations with Bob Morris." Once again,  
20 inadmissible hearsay. On page 25 of their opposition, Plaintiffs reference page 65 of Bernet's  
21 deposition where Bernet recites certain inadmissible hearsay attributed to Bob Morris. Again,  
22 there is nothing admissible here; there is no credible evidence to support their purported facts.

23           A perfect example of Plaintiffs' complete lack of evidence is their citation of page 30 of  
24 Bernet's transcript to try to show that Crary had constructive knowledge of Kristal's failure to  
25 remit deducted health insurance premiums. Bernet is asked if health insurance premiums came up  
26 in a conversation. Bernet respond by saying "No, they didn't." Thus, his testimony actually  
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1 contradicts what Plaintiffs assert. Accordingly, Plaintiffs have no evidence to support their  
2 proposed findings of fact No. 32.

3 Michael Lindemuth's deposition transcript at page 51 is cited by Plaintiffs in support of  
4 their proposed findings of fact No. 10. However, nowhere does the testimony on page 51 address  
5 this proposed finding of fact. Instead, when asked specifically if John Crary had an opinion on that  
6 matter, he states, "He didn't express one to me." And, when asked the follow-up question if  
7 Kristal told him afterward anything about Crary's opinion regarding health insurance, Lindemuth  
8 replied "No."

9 Michael Pekar's deposition testimony at pages 11 and 12 mentions a telephone call he  
10 purportedly had with Crary in the summer of 2001, one year after Crary resigned from Lassen's  
11 Board. On page 18 he states that the call was about "backpay." His deposition testimony at page  
12 25 is inadmissible hearsay. Actually, all the testimony from Pekar listed by Plaintiffs is describing  
13 what other people said to him and is, similarly, inadmissible hearsay or speculation (Pekar would  
14 "try to get to Crary through Morris." Pekar deposition at page 49). But more importantly,  
15 Plaintiffs cannot rely on a conversation that a former employee had with Crary, who was by then a  
16 former director of the Company, to show that Crary had knowledge of the health plan problems.  
17 Such conversation took place outside the relevant time period.

18 Accordingly, Plaintiffs have no evidence to support their proposed finding of fact No. 31  
19 based on the deposition testimony of Jones, Pickering, Lindemuth, Nolan, Bernet and Pekar. Nor,  
20 do Plaintiffs have any evidence to support their proposed findings of fact No. 33 where they cite  
21 "Kristal II, pp. xx, yy" below this proposed fact. Crary has no idea what this cite is referring too.  
22 There is no evidence, therefore, that Crary had any knowledge that Kristal was diverting health  
23 care funds to general corporate purposes.

24 Plaintiffs further try to rely on the relatively vague deposition testimony of Defendant  
25 Leonard Kristal to try to impugn Crary. First, Kristal is dishonest and his testimony suspect to  
26 begin with as illustrated by the deposition testimony and declarations submitted by Crary. The  
27 remarkably consistent testimony impugning Kristal's truth and veracity must be considered in  
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1 assigning credibility to any testimony originating with Kristal. Crary submitted testimony from a  
2 full seven witnesses, all of whom said that Kristal is untruthful. Plaintiffs have marked this fact as  
3 “false” yet have offered no testimony from even one witness who believes Kristal to be truthful.  
4 Moreover, Kristal’s testimony cited by Plaintiffs in this matter is taken out of context, is inaccurate  
5 and contains hearsay.

6 For example, nowhere on page 81 of his transcript does Kristal say he told Crary that  
7 Kristal was a plan fiduciary. Accordingly, Plaintiffs have no evidence to support their proposed  
8 finding of fact No. 25. Nowhere on page 82 of the transcript does Kristal say that Crary had the  
9 authority to remove him as CEO or as a director of Lassen. On page 87 of his transcript, Kristal  
10 states that he did not recall if he had any documents reflecting whether Crary was aware of  
11 Lassen’s inability to pay health insurance premiums. Kristal refers to a meeting in the late third  
12 quarter of 2000 where the financial problems were purportedly made aware to Crary. (Kristal  
13 deposition at page 87). However, Crary had resigned from the Lassen Board in August 2000.

14 Kristal admits on page 105 of his transcript that his response to the question is hearsay. He  
15 also answers that the decision that he be CEO and President was by mutual consensus between  
16 himself, Crary, and Morris (*e.g.*, the Lassen Board of directors). When asked if Crary had the  
17 authority and ability to remove him as CEO, Kristal responded by stating that he was not a  
18 corporate lawyer and that in his “personal opinion” it is right there in the shareholders agreement.

19 However, the shareholders agreement Kristal refers to does not give Crary the authority to  
20 appoint or remove Kristal as CEO of Lassen. To the contrary, it concerns three shareholders,  
21 Crary, Morris and Kristal, and their vote of shares in electing the *directors* of Lassen. Paragraph  
22 10 of the agreement says that each shareholder will vote his shares for one nominee of each such  
23 shareholder to the *Board*. This agreement does not deal with the appointment or retention of  
24 officers of Lassen. Crary did not have the authority to remove Kristal and Kristal’s testimony  
25 referenced by Plaintiffs to prove otherwise does no such thing. Hence, Plaintiffs have no evidence  
26 to support their proposed finding of fact No. 23.

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1       On page 142 of Kristal's deposition transcript he is asked about his understanding of the  
2 job responsibilities of the Chairman of the *Board*. Kristal did not directly answer the question and  
3 instead responded by stating things that are simply inaccurate. Kristal reported to the *Board*, not  
4 Crary. Kristal's statement on page 148 that Crary purportedly told people like Bob Morris that  
5 Crary would not allow Kristal to be removed is inadmissible hearsay. The same is true with  
6 Kristal's responses on page 174. Kristal references his answers at the bottom of page 173 where he  
7 states that "I was told by John Crary ..." Consequently, all of page 174 is inadmissible hearsay.

8           Lastly, Kristal states that he never relayed to Crary anything concerning the 401k  
9 documents at page 103 of his deposition. Any assertions by Plaintiffs to the contrary are  
10 completely without support. For example, Plaintiffs have marked Crary's proposed undisputed  
11 fact number 35 as false, but again offered no testimony whatsoever that Kristal ever informed  
12 Crary of the 401(K) violations.

13           The most telling part of Kristal's deposition is on page 192. When asked how much  
14 knowledge he had with respect to the 401k plan, Kristal replied none. When asked the same  
15 question with respect to the health plan, Kristal states after the fact, I was told that the Lassen  
16 Companies had withdrawn some monies . . . prior to the health insurance being stopped. If he did  
17 not know or found out after the fact, why would Crary have this information?

18           2)     Plaintiffs reargue their Motion for Review of the Report and Recommendation on  
19                   Crary's Motion to dismiss.

20           Realizing that Crary had no power to unilaterally remove Kristal, and that he was never  
21 informed of Kristal's malfeasance, Plaintiffs attempt to argue for another legal standard to be  
22 applied in this case. Plaintiffs repeat their erroneous arguments in their motion to review  
23 Magistrate Hogan's Report and Recommendation on Crary's motion to dismiss. However, all the  
24 cases Plaintiffs cited are based on the premise that the fiduciaries at issue must have the power or  
25 have exercised the power to appoint or remove the other fiduciary to the plan. Here, Crary by  
26 himself did not have the power to appoint or remove Kristal, nor did he exercise such power. Even  
27 if the Board collectively could appoint and remove Kristal as a plan fiduciary, there is no evidence  
28 that the Board actually appointed Kristal as a fiduciary to the plans. Plaintiffs alleged Kristal as a

1 functional fiduciary to the plans. In fact, Plaintiffs admit Crary's undisputed fact number 31 that  
2 Polly Jones was the named plan administrator for the health plans. The foregoing analysis makes  
3 Plaintiffs' proposed finding of fact No. 30 completely irrelevant.

4 Plaintiffs hope to create an impression of knowledge since no real evidence of actual  
5 knowledge exists. Lassen's or Wright-Bernet's poor financial condition cannot be construed as  
6 specific knowledge by Crary of Kristal's ERISA breaches. No one, not Kristal, Morris, Plaintiffs,  
7 Bernet, Lindemuth, Monroe, Jones or any other witness ever informed Crary about the health plan  
8 payment or 401k problems. It may well be that everyone knew about the problems. It may also be  
9 that everyone thought the other person had informed Crary. However, since no one actually did  
10 inform Crary about the problem, Crary did not know about it.

11 Crary lives hundreds of miles from Lassen and several thousand miles from Wright-Bernet.  
12 Despite Plaintiffs' unsupported assertions that Crary was paid thousands of dollars in consulting  
13 fees, Crary did not work at Lassen or Wright-Bernet. This is just another example of completely  
14 unsupported statements of Plaintiffs for which there is no credible evidence. For example, on page  
15 27 of their opposition brief Plaintiffs say, "Crary was paid a substantial fee," which is completely  
16 untrue and for which there is absolutely no credible evidence. As "evidence" Plaintiffs refer to an  
17 agreement by the terms of which Crary was supposed to receive a consulting fee. However 1)  
18 Crary never received the required fee, 2) there is no evidence that Crary ever received any fee, and  
19 3) the existence of an unsigned agreement by itself is no evidence whatsoever that any fee was ever  
20 actually paid. Crary was never paid \$130,000 by Lassen. [See, Supplemental Declaration of John  
21 L. Crary filed in support of this opposition]. Consequently, Plaintiffs' proposed finding of fact  
22 No. 26 is not only irrelevant but incorrect.

23 The only credible evidence is that Crary tried to get more information about Lassen and  
24 Wright-Bernet but Kristal both lied to him and prevented others from communicating with him. Or,  
25 Kristal supplied Crary with financial "projections" about Lassen instead of real numbers as is  
26 shown in Exhibit 99 to the Crary deposition. (Consequently, Plaintiffs do not have any evidence to  
27 support their proposed finding of fact No. 40).

28

1           **D. CRARY NEVER EXERCISED DISCRETION OVER THE MANAGEMENT OR  
DISPOSITION OF PLAN ASSETS.**

2           For the first time in this lawsuit, Plaintiffs allege that Crary is liable for breach of fiduciary  
3 duty under ERISA because of his own exercise of discretion over management and/or disposition  
4 of plan assets. This new theory has never been raised before and is not alleged in the First  
5 Amended Complaint. The only piece of evidence put forward to support this novel new claim is  
6 that Crary sat at one negotiation session on a collective bargaining agreement. The fact that Crary  
7 sat in at one union contract negotiation meeting does not automatically render him an ERISA  
8 fiduciary. Such action does not constitute management or administration of the benefit plan.  
9 *Hamilton v. Carell*, 224 F.3d 992, 998 (6<sup>th</sup> Cir. 2001).

10          However, the Court in *Akers v. Palmer*, 71 F.3d 226 (6th Cir. 1995), held that “only  
11 discretionary acts of plan management or administration, or those acts designed to carry out the  
12 very purpose of the plan, are subject to ERISA’s fiduciary duties.” *Id.* at 231. The purported  
13 breach of fiduciary duty must be connected to the management or administration of the plans or the  
14 assets thereof. *Id.*.. The mere fact that Crary sat in at one negotiation session for a collective  
15 bargaining agreement does not in any way put him within the definition of an ERISA fiduciary.  
16 ERISA does not require that day-to-day corporate business transactions, which may have a  
17 collateral effect on prospective, contingent employee benefits, be performed solely in the interest  
18 of plan participants. *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6<sup>th</sup> Cir.), cert. denied, 498  
19 U.S. 984 (1990).

20          Courts have frequently held that directors are not performing fiduciary roles under ERISA  
21 even when their actions arguably affect a plan. These opinions flow directly from the limiting “to  
22 the extent” language in the statute. The fact that an action taken by an employer to implement a  
23 business decision may ultimately affect the security of employees’ welfare benefits does not  
24 automatically render the action subject to ERISA’s fiduciary duties. *Sengpiel v. B.F. Goodrich  
Co.*, 156 F.3d 660, 665 (6<sup>th</sup> Cir. 1998). Pursuant to *Sengpiel*, the appointment of an officer for the  
25 corporation by the Board itself is a business decision and is in no way automatically subject to  
26 ERISA’s fiduciary duties.  
27

1 Plaintiffs have not alleged a single fact showing that Crary actually exercised any authority  
 2 or control with respect to the management or administration of the health plan and 401k plan, or  
 3 management or administration of the assets thereof, or that he rendered investment advice to any of  
 4 the plans for a fee or other compensation. Plaintiffs cannot present and have not presented any  
 5 contradictory evidence on any of these matters. Accordingly, they cannot support their proposed  
 6 finding of fact No. 41.

7 **E. CRARY IS NOT LIABLE AS A CO-FIDUCAIRY.**

8 Liability for breach of fiduciary duty is extended to co-fiduciaries only if the co-fiduciary  
 9 has actual knowledge of the breach. “Under this [participation] rule, the fiduciary must *know* the  
 10 other person is a fiduciary . . . , must *know* that he participated in the act that constituted a breach,  
 11 and must *know* that it was a breach . . . . For the first fiduciary to be liable [for concealing a  
 12 breach], he must *know* that the other is a fiduciary with regard to the plan, must know of the act,  
 13 and must know that it is a breach . . . .” Conference Report at 299, 3 ERISA Leg. Hist. At 4566.  
 14 See also *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan*, 650 F.Supp. 359, 369-370 (N.D. Ga.  
 15 1986); *Monson v. Century Manufacturing Co.*, 739 F.2d 1293 (8<sup>th</sup> Cir. 1984); *Davidson v. Cook*,  
 16 567 F.Supp. 225 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4<sup>th</sup> Cir.), *cert. den.*, 469 U.S. 899 (1984);  
 17 *Fink v. National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985).

18 Because Plaintiffs have failed to establish Crary’s knowledge regarding Kristal’s fiduciary  
 19 status or his own ERISA breach, Plaintiffs’ claims that Crary should face liability as a co-fiduciary  
 20 must fail and their motion for summary judgment therefore must be denied.

21 **F. THE UNION HAS NO STANDING TO SUE UNDER ERISA.**

22 Plaintiff Union admits in the cross-brief that it does not have standing in this action as a  
 23 union but acts as a “representative” for plan participants. However, a plaintiff must be the “real  
 24 party in interest” with respect to the claim sued upon. See FRCP 17(a). The “real party in  
 25 interest” is the person who has the right to sue under the applicable substantive law. In general, it  
 26 is the person holding title to the claim or property involved, as opposed to others who may only be  
 27 interested in or who may benefit by the litigation. *United Healthcare Corp. v. American Trade Ins.*  
 28

1      *Co., Ltd.*, 88 F.3d 563 (8<sup>th</sup> Cir. 1996); *Farrell Const. Co. v. Jefferson Parish*, 896 F.2d 136 (5<sup>th</sup> Cir. 2 1990).

3           Thus, a plaintiff “must allege facts sufficient to reveal that he suffered an injury, that the 4 injury was caused by the defendant’s illegal conduct, and that his injury could be redressed by a 5 favorable outcome to the lawsuit.” *Seckler v. Star Enterprise*, 124 F.3d 1399, 1406 (11<sup>th</sup> Cir. 6 1997). Here, the Union specifically admits that the real parties in interest are plan participants and 7 that the Union did not attempt to seek any recovery that would flow solely to the Union.

8           Federal statutes may authorize one person to sue on behalf of another without joining the 9 party or parties for whose benefit the action is brought. In such case, the person authorized to sue 10 is the real party in interest. See FRCP 17(a). In such circumstances, Plaintiffs need specific 11 federal statutes authorizing its right to sue. However, ERISA § 502(a), 29 U.S.C. § 1132(a), 12 provides that an action may be brought only by a “participant, beneficiary, fiduciary or the 13 Secretary of Labor.” *See Waxman v. Luna*, 881 F.2d 237, 240 (6<sup>th</sup> Cir.1989) (plaintiff must be 14 either a participant or a beneficiary to bring an ERISA action); *cf. Utility Workers Union v. 15 Consumers Power Co.*, 453 F.Supp. 447 (E.D.Mich.1978) (employee organization has no standing 16 under ERISA § 502), *aff’d*, 637 F.2d 1082 (6<sup>th</sup> Cir.1981), *vacated on other grounds*, 451 U.S. 1014 17 (1980).

18           ERISA’s statutory framework lists those persons empowered to bring a civil action with 19 particularity. Despite the fact that an ERISA claim may derive from a collective bargaining 20 agreement negotiated by a union, Congress has obviously chosen not to include a labor union as an 21 appropriate party to vindicate employees’ rights under ERISA.” *Intern. Union v. Auto Glass 22 Employees Fed. Credit*, 858 F.Supp. 711, 722 (M.D.Tenn. 1994). The Union, “simply by virtue of 23 its status as a labor union, does not fall within those who are designated by the statue as capable of 24 bringing an ERISA action.” *Id.* at 721. *See also New Jersey State AFL-CIO v. New Jersey*, 747 25 F.2d 891, 893 (3d Cir.1984) (“It is clear from the statute that labor unions are neither participants 26 nor beneficiaries”).

27           The Court should also keep in mind that the cases cited by Plaintiffs are not from the Sixth 28

1 Circuit. The case on point is *Waxman v. Luna*, *supra*. If the Sixth Circuit wanted to overrule that  
 2 case it had an opportunity to do so in *Local 6-0682 International Union of Paper, Allied-Industrial,*  
 3 *Chemical & Energy Workers v. National Industrial Group Pension Plan*, 342 F.3d 606 (6<sup>th</sup> Cir.  
 4 2003), the case cited by Plaintiffs in note 7 of their cross-brief. However, the Sixth Circuit  
 5 specifically refused to create common law standing for the union. In fact, it reiterated that a union  
 6 is not one of the enumerated parties listed in § 502(a) of ERISA. *Id.* at 609, n.1.

7 Because ERISA § 502(a) does not authorize the Union's standing to sue, it cannot be a  
 8 Plaintiff in this lawsuit let alone seek judgment against Crary.

9 **G. CRARY IS NOT LIABLE AS A PARTY-IN-INTEREST.**

10 Also at the eleventh hour in this litigation, Plaintiffs allege Crary is now liable as a party-  
 11 in-interest under ERISA § (14)(A). The new allegation is set forth in Plaintiffs' cross-brief, therein  
 12 alleging that Crary was a non-fiduciary but a party-in-interest, under ERISA § 3(14)(E)(i), and that  
 13 he engaged in prohibited transactions. Because Plaintiffs did not allege this cause of action in the  
 14 first amended complaint, the Court should disregard Plaintiffs' argument now.

15 To hold a non-fiduciary party-in-interest liable, the defendant's knowledge of wrongdoing  
 16 must be established. The Supreme Court has held that a cause of action lies under ERISA  
 17 § 502(a)(3) against a nonfiduciary party-in-interest who *knowingly* participates in a prohibited  
 18 transaction (emphasis added). *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S.  
 19 238 (2000). A nonfiduciary is liable only for its "knowing participation" in a fiduciary's breach.  
 20 *Id.* at 248. *Brock v. Hendershott*, 840 F.2d 339 (6<sup>th</sup> Cir. 1988), a case cited by Plaintiffs, also  
 21 required the non-fiduciaries to have actual or constructive knowledge of wrongdoing in order to  
 22 hold them liable under ERISA.

23 Plaintiffs not only have failed to establish Crary's actual or constructive knowledge of  
 24 wrongdoing, but have also failed to present any evidence that Crary engaged in ANY prohibited  
 25 transactions.

26 **H. PLAINTIFFS DO NOT SEEK APPROPRIATE REMEDIES IN THIS MATTER.**

27 The question of whether a participant can bring suit for breach of fiduciary duty under  
 28

1       § 1132(a)(3), however, is separate and distinct from the questions of the form of relief available  
 2 under that section. See, *Hoeberling v. Nolan*, 49 F.Supp.2d 575 (E.D.Mich. 1999). Plaintiffs  
 3 confuse these two different issues.

4           1)     Remedies will only inure to the benefit of the plan as a whole.

5       A plan participant may not sue in his individual capacity under § 1109, which provides that  
 6 a fiduciary “shall be personally liable to make good to such *plan* any losses to the plan resulting  
 7 from each such breach.” (emphasis added). See, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473  
 8 U.S. 134, 140-44 (1985) (holding that recovery for a violation of § 1109 inures to the benefit of the  
 9 plan as a whole, precluding suits by participants in their individual capacity). Therefore, Plaintiffs’  
 10 are not able to recoup their personal loss.

11           2)     Plaintiffs may only receive equitable relief for the benefit of the plan but not an  
                  award of monetary damages.

12       The Supreme Court in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), held that money  
 13 damages are the classic form of legal relief and that “other equitable relief” as used in § 1132(a)(3)  
 14 does not encompass monetary damages. *Mertens* specifically held that §1132(a)(3)'s reference to  
 15 “equitable relief” was limited to the “remedy traditionally viewed as ‘equitable,’ such as injunction  
 16 or restitution.” *Id.* at 255. Because money damages are “the classic form of *legal* relief,”  
 17 § 1132(a)(3) does not authorize suits for compensatory, much less punitive damages. *Id.*  
 18 Consequently, in *Allinder v. Inter-City Products Corporation (USA)*, 152 F.3d 544 (6<sup>th</sup> Cir. 1998),  
 19 the Sixth Circuit granted summary judgment to the defendants because Allinder sought  
 20 compensatory and punitive damages which were not available to her as a matter of law.

21       Plaintiffs’ reliance on *Varsity Corp. v. Howe*, 516 U.S. 489 (1996), for the proposition that  
 22 an individual plan participant may recover damages under § 1132(a)(3) is misplaced. The  
 23 plaintiffs in *Varsity* were actually seeking a classic equitable remedy, reinstatement to a plan. See  
 24 *Hoeberling v. Nolan*, 49 F.Supp.2d 575 (E.D.Mich. 1999). “Over the past decade, both the  
 25 Supreme Court and the Sixth Circuit have thoroughly examined the question of whether a plan  
 26 participant suing in an individual capacity may recover monetary damages as ‘other equitable  
 27 relief’ under § 1132(a)(3). More recent cases preclude an award of monetary damages.” *Id.* at  
 28

1 578.

2 Because ERISA does not authorize breach of fiduciary duty claims for monetary damages  
 3 by participants suing in their individual capacity, Plaintiffs are not entitled to summary judgment  
 4 for monetary damages.

5 **III.**

6 **CONCLUSION**

7 Plaintiffs' motion is very late and responding to it and to the late third-party summary  
 8 judgment motions filed with it is unfair to Crary. However, viewed with an eye toward admissible  
 9 evidence proffered by Plaintiffs to establish that they are permitted judgment against Crary, there is  
 10 no substance. Plaintiffs use a milieu of hearsay, unsupported assertions, misquoted testimony and  
 11 completely discredited opinions to try to establish liability against Crary. They fall far short. The  
 12 weight of admissible testimony is clear that Crary did not have the "power" claimed and did not  
 13 actually have the knowledge that would have been necessary for him to try to intervene in Lassen  
 14 and either breach a shareholders agreement or breach an employment contract.

15 Plaintiffs cannot establish liability against Crary because Crary never single-handedly had  
 16 the authority or ability to appoint or remove Kristal. Moreover, Plaintiffs do not have evidence to  
 17 support their claims for breach of fiduciary duty. For all the foregoing reasons, Plaintiffs' motion  
 18 for summary judgment should be denied.

19 Dated: December 10, 2003

20 Respectfully Submitted,

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3 **CERTIFICATION OF SERVICE**

4 I hereby certify that on December 10, 2003, I electronically filed the foregoing with the  
5 Clerk of Court using the CM/ECF system, which will send notification of such filing to the  
6 following.

7 David M. Cook (0023469)  
8 Stephen A. Simon (0068268)  
9 David M. Cook, LLC  
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14 I further certify that on December 8, 2003, I served the following by ordinary U.S. Mail:

15 Leonard Kristal (pro se)  
16 107 Diablo Drive  
17 Kentfield, CA 94904

18 And by email at ldkristal@yahoo.com

19 */s/ Stephen R. Felson*